In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 792

MONTEREY COUNTY BUILDING & CONSTRUCTION TRADES COUNCIL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (P.A. 1–9)[1] is reported at 335 F. 2d 927. The Board's decision and order (P.A. 10–56) are reported at 142 NLRB 139.

[1] "P.A." refers to the appendix to the petition for certiorari. "Tr." refers to the stenographic transcript which was reproduced as "Volume II, Transcript of Record." "G.C. Ex." refers to exhibits of the General Counsel. Whenever in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

762-195—65

JURISDICTION

The decision of the court below (P.A. 1–9) was rendered on August 18, 1964, and its judgment was entered on the same day (P.A. 57). A petition for rehearing was denied on October 1, 1964, and a decree was then entered (P.A. 58, 59–61). The petition for a writ of certiorari was filed on December 29, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether persons employed by contractors to construct and install poultry breeding buildings and equipment, on a site which will be a farm when the construction is completed, are "agricultural laborers" within the meaning of Section 2(3) of the National Labor Relations Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*), the National Labor Relations Board Appropriations Act (Title III, Act of September 22, 1961, 75 Stat. 589, 609), and of the Fair Labor Standards Act (52 Stat. 1060, 29 U.S.C. 201, *et seq.*,), are set forth at pp. 3–4 of the petition.

STATEMENT

Buckeye Incubator Company (herein called Buckeye) is a Delaware corporation doing business throughout the United States (P.A. 21; Tr. 184, 203). Buckeye has a factory at Springfield, Ohio, where it manufactures approximately 160 products for use in

the poultry industry, and where it engages in other manufacturing activities (Tr. 185). Buckeye also furnishes financing and serves as the general contractor in connection with the construction and installation of large-scale poultry-breeding operations (P.A. 21; Tr. 186). Buckeye's gross annual business exceeds $4,500,000 (P.A. 21; Tr. 207).

In July 1961, Buckeye entered into a contract with Vito La Torre to construct and install poultry raising buildings and equipment at an undeveloped site of land owned by La Torre at Watsonville, California (P.A. 23; Tr. 29, G.C. Ex. 3). La Torre and his wife are the sole stockholders of three corporations operating poultry ranches in the Watsonville area (P.A. 20–21; Tr. 22–23). Buckeye's employees, who were not union members, were to install all the poultry raising equipment at the new site, which is known as the Elkhorn Ranch (P.A. 23; Tr. 76, 198, 202). Construction of the buildings was subcontracted by Buckeye to the Jack L. Whiteside Construction Company, an employer of nonunion carpenters, plumbers, laborers, and electricians (P.A. 22, 23; Tr. 77, 307, G.C. Ex. 5). Buckeye subcontracted the exterior electrical work at the Elkhorn site to Sanders Electric Company, an employer of union labor (P.A. 22, 23; Tr. 77, 243). Grading, road construction, and the construction of drainage ditches at the Elkhorn location were contracted for directly by La Torre with the Granite Construction Company, a general engineering work concern employing union labor (P.A. 21, 23–24; Tr. 76–77, 333, G.C. Ex. 4).

Petitioner Monterey County Building & Construction Trades Council (herein called the Union) is a labor organization composed of delegates from various building trades unions (P.A. 23; Tr. 528). The operating engineers employed by Granite and the electricians employed by Sanders are members of locals that belong to the Council (P.A. 24; Tr. 76–77, 530–532). Early in September 1961, shortly after construction activity had commenced at the Elkhorn site, representatives of the Union approached Buckeye with a request that it sign the Union's standard labor agreement (P.A. 24; Tr. 223–224, 225–226, G.C. Ex. 8, 9). The terms of that agreement provided that Buckeye would recognize the Union's affiliated locals as the bargaining representative for its employees, and that it would engage only subcontractors who either employed members of the Union's constituent locals or agreed that their employees would become members of one of those locals after seven working days (P.A. 24–25; G.C. Ex. 9). Buckeye refused to sign the agreement proffered by the Union (P.A. 24; Tr. 224). The Union also approached Whiteside and requested that it sign the standard agreement (P.A. 25; Tr. 312–315). Whiteside refused, claiming that he could not afford the increased labor cost that would result from the agreement (P.A. 25; Tr. 313–314). On September 19, the Union commenced picketing at the Elkhorn Project, and the picketing continued for more than thirty days (P.A. 25–32; Tr. 77, 90–92).

The Board found that the Union violated Section 8(b)(7)(C) of the National Labor Relations Act,

since a purpose of the picketing was to force or require Buckeye and Whiteside to recognize and bargain with the Union, and the picketing had continued for more than thirty days without a representation petition having been filed (P.A. 11–12). The Board further found that, since the picketing was also designed to cause Granite and Sanders to cease doing business with La Torre, Buckeye, and Whiteside, the Union also violated Section 8(b)(4)(B), the secondary boycott provision of the Act (P.A. 13, 37–41). The Union does not contest that its picketing was for recognitional purposes, and also had the secondary object proscribed by Section 8(b)(4)(B) (Pet. 9). Instead the Union contends that the persons employed by Buckeye and Whiteside who worked at the Elkhorn site were "agricultural laborers," and were therefore excluded from the definition of "employee" contained in Section 2(3) of the Act. The Board rejected this argument on the ground that the Elkhorn Ranch was not devoted to actual farming activities during the period in question, and that the construction performed by Buckeye and Whiteside was major independent construction activity and not part of an agricultural function (P.A. 11–13). The Board ordered the Union to cease and desist from its illegal conduct (P.A. 14–15).

The court of appeals sustained the Board's unfair labor practice findings, and enforced its order. In so doing, the court affirmed the Board's determination that the employees of Buckeye and Whiteside did not fall within the agricultural exemption contained in the Act (P.A. 1–9).

ARGUMENT

The decision of the court of appeals is clearly correct and there is no conflict of decisions. Consequently, there is no occasion for further review by this Court.

The question presented is whether the persons employed by Buckeye and Whiteside on the Elkhorn Ranch were "agricultural laborers" and thus exempt from the Act. The Act does not define the terms "agricultural laborer," but riders to the National Labor Relations Board Appropriation Act have incorporated the definition of "agriculture" contained in Section 3(f) of the Fair Labor Standards Act. *E.g.*, 75 Stat. 609. As this Court pointed out in *Farmers Reservoir & Irrigation Company* v. *McComb*, 337 U.S. 755, 762, "this definition has two distinct branches." The primary meaning covers actual farming operations; the secondary meaning includes "any practices * * * performed either by a farmer or on a farm, incidently to or in conjunction with 'such' farming operations." *Id.* at 763.

The primary meaning of agriculture concerning actual farming is admittedly not involved here. As to the secondary meaning, the Board and the court of appeals found that the work performed by Buckeye and Whiteside was independent of farming activity (P.A. 7, 12). See also *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U.S. 755, 761; *Maneja* v. *Waialua Agricultural Co.*, 349 U.S. 254, 264–270; *Mitchell* v. *Budd*, 350 U.S. 473, 481, 482. While petitioner contends, to the contrary, that this work was incident to normal farming operations, it is not necessary to reach this issue since the secondary meaning is not

satisfied even if we accept that contention. In all events it is clear that Buckeye and Whiteside are not farmers, and the Board found that the work which they performed was not on a farm, for the Elkhorn site was not as yet ready for farming operations.

The Board's finding that the work was not performed on a farm is amply supported by the record. The regulations of the United States Department of Labor construing the agricultural exemption in Section 3(f) define a "farm" as "a tract of land *devoted to the actual farming activities* included in the first part of section 3(f)" (emphasis added). 29 C.F.R. 780.144; P.A. 55–56. As the Board found, the Elkhorn site, at the time of the picketing, "was still a tract of land not developed into a farm" (P.A. 12). Prior to the construction activity, it was barren, desolate property which had never been utilized as a farm. The installation of utilities at the site was not completed by the Pacific Gas and Electric Company until more than three months after September 14, when the picketing began (P.A. 12; Tr. 541–542). Moreover, the first chickens were originally scheduled for delivery on December 22, when buildings and equipment were scheduled to be available to care for them. But, because of delays occasioned by the labor dispute, completion of facilities necessary to commence the farm's operation was delayed beyond that date (Tr. 137–139). In short, the farming activity on the site, *i.e.*, the raising of poultry, did not commence until January 1962, at least three months after the picketing commenced.[2]

[2] If the Board and court of appeals erred in determining that the persons employed by Buckeye and Whiteside were not

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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JANUARY 1965.

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agricultural laborers and therefore not "employees" within the meaning of the Act, this would require overturning the Board's order as to Section 8(b)(7)(C) since petitioner Union would not then have been required to submit a representation petition within thirty days of the start of picketing. However, even then, the Board's conclusion that petitioner violated Section 8(b)(4)(B) would still be correct. That Section proscribes secondary activity aimed at causing a cessation of business between a neutral "person" and "any other person." It is well settled that the term "person," when used in the Act, is not limited to employers employing individuals who are statutory "employees." *Plumbers, Local 298* v. *County of Door*, 359 U.S. 354; *Local 25, International Brotherhood of Teamsters* v. *N.Y., N.H. & H. R. Co.*, 350 U.S. 155. Thus, Section 8(b)(4)(B) applies even if we assume that both the employees of Buckeye and Whiteside, the employers involved in the dispute, and those of Granite and Sanders, the neutral employers, were agricultural laborers and therefore not "employees" under the Act.

U.S. GOVERNMENT PRINTING OFFICE: 1965